United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
ROY L. REARDON

74-1818

United States Court of Appeals
FOR THE SECOND CIRCUIT

DAVID LANE and MARY ANN LANE,
Plaintiffs-Appellants,

against

GENERAL MOTORS CORPORATION, A. B. CHANCE CO. and PITMAN MANUFACTURING CO., a division thereof (herein referred to as "Pitman"), and GOODYEAR TIRE & RUBBER COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE GENERAL MOTORS CORPORATION

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Preliminary Statement

Plaintiffs-appellants, David and Mary Ann Lane,* appeal to this Court, pursuant to 28 U.S.C.A. § 1291, from a Judgment and Order dated March 19, 1974 dismissing their action for personal injuries and loss of services following a unanimous jury verdict rendered March 18, 1974 on the issues of liability in favor of the defendant-appellant General Motors Corporation ("General Motors") and the defendant Pitman Manufacturing Co. ("Pitman").** The case was tried before Judge Edward Weinfeld.

* Mary Ann Lane's claim is a derivative one for loss of services. Mr. and Mrs. Lane will be referred to herein as the "plaintiffs" or "appellants" as the context requires.

** Prior to the trial of this action, the plaintiffs discontinued their action against the captioned defendant, Goodyear Tire & Rubber Company. Subsequent to the trial, the plaintiffs discontinued their appeal against Pitman.

This action arises out of a one-vehicle accident that occurred on February 4, 1970 in New Jersey. The plaintiff David Lane was injured while riding as a passenger in a utility truck owned by his employer, Jersey Central Power & Light Co. ("Jersey Central"), when it rolled over while out of control after striking a median curb. Lane was partially ejected from the vehicle and sustained injuries in the nature of permanent paraplegia. As a result of the accident, the truck was rendered a total wreck. The claims of the plaintiffs can be divided into two categories. First, the plaintiffs claimed that the truck, a 1967 GMC TM7750A which was modified by Pitman and the Hendrickson Manufacturing Company ("Hendrickson"), was unstable and top-heavy and that these factors caused the truck to roll over. Second, the plaintiffs claimed that the right front door latching mechanism on the cab was improperly designed in that it allowed the door to open when the mechanism was subjected to nominal forces during the rollover process.

Issues Presented

1. May appellants who fail to except to a charge to a jury as required by Rule 51, Federal Rules of Civil Procedure, and who, in the court below, state that the charge was very balanced and pre-eminently fair, urge as grounds for reversal alleged errors of law in the charge substantially in accord with the appellants' own requests to charge and position taken during the course of the trial?

2. Was the charge to the jury in this case erroneous?

3. Did the Distict Court err in not instructing the jury that the latching mechanism was *per se* defective and have the appellants waived their right to have this issue decided by this Court?

Statement of the Case

The appellants correctly state that this case presented "hard fought, complex and difficult" issues of fact (Appellants' Brief at 54). In appealing to this Court, the appel-

lants do not contend that the jury's resolution of these issues in favor of General Motors is not fully supported by the record. This appeal is based upon supposed errors in the District Court's instructions to the jury—instructions to which the appellants took no exception and, indeed, instructions which were praised by the appellants below. In a scattershot approach, the appellants find fault with various isolated portions of the District Court's instructions and ask this Court to reverse the judgment below to avoid "a serious miscarriage of justice" (*Id.* at 58). This appeal is totally without merit. Not only have the appellants waived all objections to the instructions but also have ignored the entire charge and record in their attack upon Judge Weinfeld's instructions. There has been no miscarriage of justice but rather an understandably severe disappointment in the jury's resolution of a "hard fought, complex and difficult case."

The focal points of the appellants' brief are that the District Court's charge to the jury misstated their theory of proximate causation and, consequently, charged them "out of court" (*Id.* at 21), and that the District Court's improper response to a question from the jury "fatally infected" the verdict (*Id.* at 7). This myopic view of the case ignores the multitude of legal and factual issues presented by the voluminous record of this case in a futile attempt to find fault with Judge Weinfeld's charge. This case was not presented to the jury by the plaintiffs on these narrow grounds; indeed, it could not have been.

The case presented to the jury was the product of approximately three years of pre-trial discovery. The trial alone occupied 15 days of the Court's time and consumed 2,463 pages of transcript which reflect the testimony of 31 witnesses and the admission of approximately 190 exhibits. The testimony of various witnesses, as well as their credibility, was in sharp dispute. In the framework of the record, Judge Weinfeld instructed the jury as to the law.

The District Court's charge was not the product of spontaneity on Judge Weinfeld's part. All parties submitted trial memoranda and requests to charge and the District Court conferred with the parties in advance to insure that it was apprised of each party's respective position (T. 2455).* As will be demonstrated below, significant portions of the charge, including the plaintiffs' theory of proximate causation, were the direct product of the plaintiffs' trial memorandum and requests to charge. Moreover, it will be shown that the theory of proximate causation presented to this Court by the plaintiffs—namely, "that the door opened when the rear wheels hit the median . . ." (Appellants' Brief at 39)—is at variance with the testimony which provided the foundation for their experts' opinions and is diametrically opposed to the theory they advanced in the District Court below during a post-trial motion. The plaintiffs' attack on the District Court's handling of a question from the jury is equally frivolous. The District Court conferred with all counsel prior to responding to the question and obtained an approval to the response given and, moreover, plaintiffs' counsel of record conceded that the question "had no particular significance" (T.N.T. 6).** On this appeal, the plaintiffs have chosen to ignore their express approval of the District Court's response and have interpreted the jury's question in an illogical manner that defies reasonableness as well as the record.

The chameleon-like character of the arguments presented to this Court is not evinced solely by the above. Prior to the submission of this case to the jury, the plaintiffs described Judge Weinfeld's charge as "very balanced" (T. 2454); in their motion for a new trial, the charge

* Numbers in parentheses preceded by the letter "T" refer to pages in the stenographic transcript of the trial.

** Portions of the transcript of the argument on plaintiffs' Motion for a New Trial are reprinted in the Joint Appendix and will be referred to herein as "T.N.T."

was described as "pre-eminently fair" (T.N.T. 15). On this appeal, Judge Weinfeld's charge is characterized as "fundamentally erroneous" (Appellants' Brief at 18).

Not content to attack Judge Weinfeld's charge solely on the grounds of its purported misstatement of plaintiffs' theory of proximate cause and erroneous response to the jury's question, the charge is questioned on several other grounds of lesser dimension which fall into two categories which allegedly are highly prejudicial. First, the plaintiffs claim that General Motors' *alleged* failure to install "safety latches" available in the industry *ipso facto* establishes proof of a defect. Aside from plaintiffs' failure to raise this point before the District Court, it will be demonstrated herein that the issues of defect and the use of "safety latches" in the truck industry were disputed questions requiring jury resolution and, furthermore, Judge Weinfeld's instructions on this issue were in accord with the plaintiffs' requests to charge and more favorable to the plaintiffs than the standards mandated by New Jersey law. Second, the plaintiffs complain that various portions of the instructions confused the jury. Aside from the plaintiffs' failure to except to any portion of the charge, much less the presently attacked portions, and the plaintiffs' attempt to psychoanalyze the jury, it will be demonstrated herein that the jury was properly instructed.

In addition, the plaintiffs' conduct below is tantamount to a waiver of objections to the District Court's instructions to the jury. In any event, it is respectfully submitted that none of the grounds urged for reversal are founded in law or in the record. This case presented sharply disputed issues of fact and credibility and these issues were resolved by a jury whose diligence, interest and attention were praised by the District Court and by plaintiffs' counsel (T. 2412; T.N.T. 14). Because the issues raised by this appeal are far broader in factual content that the issues stated in the Appellants' Brief, General Motors respectfully begs the Court's indulgence in setting forth in detail a summary of this voluminous record.

The Facts

The accident vehicle was purchased by Jersey Central for use by its transmission crews in utility work to be performed both along public roads ("on the road") and along utilities rights of way ("off the road") where no public roads existed (T. 83). To accomplish this task, Jersey Central conceived a truck with four wheel drive and flotation tires (T. 82). The utility truck which is the subject of this appeal was manufactured in three stages. General Motors manufactured the underlying cab and chassis of the vehicle, a 1967 GMC truck with rear wheel drive and six tires; two tires on the front axle and four tires ("duals") on the rear axle (T. 1361-62). The basic 1967 GMC cab and chassis was then shipped by General Motors to Hendrickson. Hendrickson performed substantial modifications to the basic cab and chassis so that it would conform to the specifications of the vehicle that Jersey Central wanted. The modifications consisted of, among other things, the installation of a front-drive axle and flotation tires with the appropriate rims. On or about March 8, 1967, the modified vehicle was then delivered to Pitman which added a utility body consisting primarily of a hydraulic boom, a man cab and various appurtenances (T. 103-04). The vehicle was delivered to Jersey Central, the ultimate purchaser, on June 2, 1967 (T. 282). After approximately two and three-quarter years (T. 142) and approximately 12,000 miles of usage (Exh. A-69),* the truck was involved in the subject accident.

During its life the vehicle was used by Jersey Central for on and off-the-road utility work in connection with the repair and maintenance of transmission lines. Thus, the vehicle had a history of traveling over a variety of road

* This exhibit is a General Motors exhibit which is reproduced in the Joint Appendix. Due to the bulky nature of the other exhibits, they are not reproduced in the Joint Appendix. General Motors' exhibits are designated by the letter "A" preceding the exhibit number. The plaintiffs' exhibit numbers do not have a prefix.

surfaces or terrain without being involved in an accident (T. 408) and without any incident involving an accidental door opening (T. 411). At the time of the accident, the truck, which was pulling an unbraked trailer (T. 292, 1299-1300, 1303), was proceeding north on Route 9 in Manalapan Township, New Jersey at approximately 25 m.p.h. (T. 231). The roadway was covered with snow and ice and the driving conditions were extremely hazardous (T. 62) with winds blowing at better than 25 m.p.h. (T. 1233-34).

The driver of the vehicle, David Burlew, had been employed by Jersey Central for thirteen days prior to the accident (T. 218-19). Although there was conflicting testimony, the record supports the conclusion that Burlew had never driven this vehicle before and that he was driving because of a union rule requiring the junior man on the work crew to drive (T. 503). He had received no training, emergency or otherwise, in the operation of this vehicle prior to the accident (T. 146).

As the vehicle was coming to an intersection, Burlew realized that the light was going to change from green to amber. He applied the brakes and the vehicle went into an uncontrollable counterclockwise skid picking up speed in the process. The front wheels mounted a nine and one-half inch center median curb (T. 2046), and, as the vehicle continued in the skid, the side of the right rear wheel smacked against the curb causing it to lose its air. The vehicle then proceeded diagonally across the median divider and ultimately landed on its right side. During the course of the accident, the right front door opened and Lane was partially ejected.

The Plaintiffs' Theories of Liability

The plaintiffs presented two basic theories of liability to the jury. First, the vehicle was unstable due to the fault of General Motors and/or Pitman. Second, the General Motors' door latch was defective.

Instability: Since the appellants have apparently conceded that the stability issue is out of the case, as indicated by their withdrawal of their appeal against Pitman and by the focus of their brief on the door latch, General Motors respectfully refers this Court to paragraphs 9-17 of General Motors' Affidavit in opposition to the plaintiffs' Motion for a New Trial which is reproduced in the Joint Appendix for a discussion of the testimony on this issue.

Door Latch: The appellants categorize the timing of the door opening as "probably the only issue" in this appeal, and take umbrage at Judge Weinfeld's description of this timing of the door opening as "during the rollover." General Motors agrees that the timing of the door opening is highly significant. Indeed, the structure of General Motors' case was that the door did not open when the truck mounted the curb with its front wheels but rather that the door opened immediately after the right rear wheel impacted the curb broadside. The engineering explanation proffered by General Motors was that due to Newton's law of inertia the kinetic energy of the vehicle was dissipated by the impact, as evidenced by the extensive damage to the chassis, superstructure, trailer hook, and right-rear rim of the truck and the gouging of the concrete median, and that, regardless of the type of latch used, no door latch would have withstood the impact.

The plaintiffs on this appeal take the position that the door opened when the right rear wheel impacted the curb but that there was no significant damage to the truck chassis at that time. The plaintiffs did not try the case on that sole theory but, in addition, advanced an alternative theory that the door opened prior to the right rear wheel impact:

> "The truck mounted the curb with the front wheels flush. There was no question of some kinetic energy at that point. When you couple that with the fact that the trial record shows that the door jumped open

> before the right wheel hit the curb, it shows that the weight of the evidence on the subject of kinetic energy is very much in doubt." (T.N.T. at 9-10)

Regardless of the position taken by the plaintiffs below and regardless of the position they now advocate, it will be shown below that the evidence supports General Motors' theory of the door opening and that the jury was charged in part, on this sharply disputed issue of fact, in accordance with the plaintiffs' own language: "During the roll-over process the right front door of the truck came open . . ." (Plaintiffs' Trial Brief at 1*).

To support their claim of a defective door latch, the plaintiffs proffered the testimony of members of the crew, Messrs. Lane, Burlew and Leighton, and the plaintiffs' experts, Messrs. Ehrlich and Severy.

Before summarizing the testimony on this issue, the circumstances surrounding the accident must be emphasized. The vehicle weighed 28,000 pounds (T. 1196) and was pulling a free-wheeling, unbraked trailer. The road surface was very slick and consequently had a low coefficient of friction (T. 1132). The vehicle went into a counterclockwise spin while traveling at 25 m.p.h., gaining speed as it rotated (T. 399), mounted the nine and one-half inch curb with its front wheels, and struck the curb broadside with its right rear wheel (T. 426-27). The vehicle then proceeded diagonally across the median, dragging and gouging into the grass and completed the rollover process (T. 201, 422).

Testimony of the Crew: The plaintiffs have placed much reliance upon the testimony of Burlew, the driver of the vehicle, who supposedly described the latching mechanism

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* After receipt of the Appellants' Brief, General Motors requested a stipulation that plaintiffs' requests to charge and trial brief be formally included in the record. The plaintiffs refused. Rather than delay this appeal by a motion, General Motors will set forth various portions of these materials in its brief—portions which show that the District Court charged the jury in substantial conformity with the plaintiffs' expressed positions.

on the right door of the man cab which did not open. The reliance is misplaced. Burlew merely described the man cab door as having a *handle* that slid back and forth:

> "It was a *handle* that slid back and forth. It unlatched the door this way (indicating).
>
> "The Court: Indicating a sideways movement or lateral movement." (T. 214) (emphasis added)

In describing the "handle" to the subject latch, Burlew merely testified that it "went up to open, I think it was, and down to lock." (T. 225). Thus, all Burlew described for both the cab and man cab was the manner in which the door handle actuated the latching mechanism and the jury was left to speculate as to the type of latch used on the man cab—a speculation not assuaged by the plaintiffs even though their counsel whet the jury's appetite with his comments in reply to the following question from the jury:

> "What kind of lock did the Pitman cab have?
>
> • • •
>
> "Mr. Walkup: Oh, I know what kind it is. I have sat in it." (T. 2162-63)

The testimony of Lane and Leighton, who was seated between Lane and Burlew, was an important facet of the plaintiffs' case that was incorporated into hypothetical questions posed to the plaintiffs' experts. Lane, who was seated next to the front right door, testified that the door opened "as we were going over the divider" (T. 906) and that he heard a loud noise prior to the door opening (T. 907). Leighton testified as follows: The door opened after the truck mounted the curb but prior to the rear wheel impact (T. 398-99); when the door opened, Leighton heard "a loud popping metal against metal sound" (T. 405), a sound he acknowledged could have emanated from gyrations of the trailer (T. 418); at the time the door opened, the truck had already tipped or leaned "at least" 20 degrees (T. 430); thereafter, when the right rear wheel impacted the curb,

the passengers experienced "quite a jar—a bump, a good shot, but I wouldn't say it was a real, severe jar" (T. 427).*

This testimony was characterized by the plaintiffs in a post-trial motion as unequivocal proof that the door opened prior to the right rear wheel impacting the curb (Plaintiffs' Reply Affidavit in Support of Motion for a New Trial at 5). The testimony of Leighton was incorporated into Ehrlich's hypothetical (T. 633-34) and all of the above testimony was incorporated into Severy's hypothetical (T. 986).** Thus, the hypotheticals were based upon a theory of the case quite the opposite of plaintiffs' present position. Ironically, both of the experts chose to ignore the factual basis of their hypotheticals by apparently concluding that the door opened after the rear wheel impacted the curb—the position advocated by General Motors.

The credibility of the testimony of the crew was an issue to be resolved by the jury. Lane's interests were obviously contrary to those of General Motors and Leighton's sympathies naturally leaned toward his injured co-worker. Burlew obviously had interests contrary to General Motors: one, a fear of losing his job—a fear going back to February 4, 1970 which he expressed at the accident scene (T. 304); two, an interest in removing whatever blanket of guilt for Lane's injuries that may have burdened him. The jury could have discounted all of their testimony.

Testimony of Robert Ehrlich: The testimony of Ehrlich on the timing of the door opening was quite confusing. The plaintiffs' hypothetical was phrased as follows:

> "[W]hile the front of the vehicle was going over the center divider and partly into the southbound lane, the rear right wheel of the vehicle struck the curb of the median divider, at which time the truck started to tip to the right, or lean to the right, and

* Counsel for plaintiffs subsequently conceded that "[i]t was a big impact, and nobody is debating that" (T. 2367).

** Lane's testimony occurred subsequent to Ehrlich's opinions.

> eventually fell in a slow manner onto its right side; and that at the time the vehicle was leaning approximately 20 degrees to the right, the right front door of the vehicle was heard to give a popping sound and at that time was observed to fly open as the vehicle was turning and continuing to land on its right-hand side. . . ." (T. 633-34)

Based upon the hypothetical, Ehrlich opined that the vehicle "twisted in some manner, the front wheel hitting first and the rear wheel swinging around . . . [and] . . . [t]his allowed the latch to become disengaged . . ." (T. 644). This testimony could easily have been construed by the jury as an opinion that the door opened prior to the impact of the rear wheel. Upon cross-examination by General Motors, Ehrlich clarified his position:

> "A I was told that the door didn't pop open until it hit the curb.
>
> "Q Until it hit the curb in the front or in the rear?
>
> "A When it started to tip over about 20 degrees. That was, I presume, when it hit in the rear. It didn't tip over when it hit the front, I'm pretty sure. . . ." (T. 746)

General Motors respectfully submits that Ehrlich's "presumption" is not founded in the testimony of Leighton.

Ehrlich described the locking system as being comprised of the striker plate, the latch and the wedges (T. 651). The basic defect in the latching system, according to Ehrlich, was that the door frame warps in an accident and that this causes the door to "open at will with very little force" (T. 673). Ehrlich was of the opinion that the latch should have been totally encapsulated in the striker (T. 677) and that a totally encapsulated lock would have prevented the accident vehicle's door from opening because the damage to the truck was "minor" (T. 689-90). Thus, the focus of Ehrlich's testimony was that the door opened because of a minor impact and a totally encapsulated lock would not have so opened. Ehrlich stated that the speed of the vehicle was, in essence, irrelevant to this conclusion.

Had the vehicle been traveling faster than 20-25 m.p.h., his conclusion would not change (T. 741). He also stated that the door could be opened through the inadvertent action of the occupants (T. 744). To demonstrate the design that should have been used, in his view, Ehrlich prepared a mock-up of a "safety latch" that was used in passenger cars as early as 1963. Insofar as the use of "safety latches" on trucks, Ehrlich testified that such latches were used on "light pick-up trucks that double as passenger cars"; however, he confessed his ignorance of their use on heavy trucks (T. 687-88). He also constructed a scale sample of the truck door showing the manner in which the rotor of the latch purportedly fitted into the striker when the door was closed.

The cross-examination of Ehrlich was quite revealing. He had never professionally examined a door latch before and had never written on the subject of door latches (T. 693-94). His lack of knowledge concerning latches in general and the subject latch in particular went much deeper. He testified and his model of the door reflected that the latch had two positions, latched and open. (Exhs. A-85, A-88). Ehrlich did not even know that the latch, in fact, had three positions: primary, secondary and open (T. 725-26, 730, 736). Ehrlich finally conceded that the position which counsel for General Motors called to his attention— a position Ehrlich was ignorant of prior to his cross-examination —was the fully latched position (T. 736, Exh. A-89). The position that Ehrlich described as the locked position in his direct testimony was actually the secondary position, the position of the latch when the door is not firmly shut (T. 738). The inadequacy of Ehrlich's knowledge in this area was pictorially demonstrated during cross-examination, as well as by the manipulation of the latch mechanism itself in three different positions. Ehrlich's lack of expertise on the subject of the effect of chassis twist was also apparent. When asked about objective evidence of chassis twisting, Ehrlich testified that the windshield popped open

and that this evidenced chassis twisting (T. 750-51). Leighton had earlier testified that he kicked the window out in order to extricate himself from the turned-over vehicle after the accident (T. 401). The above factors surely went to Ehrlich's credibility as well as the weight the jury was prepared to give his testimony. Their resolution of these matters is clearly supported by the record.

Testimony of Derwyn Severy: Severy also testified as to the timing of the door opening. The hypothetical facts posed to Severy were somewhat different than those presented to Ehrlich:

> "That at about the time the rear hit the curb on the median and the truck was tilting to the right about 20 degrees, a loud noise, popping sound, was heard a the right door, and at the same time the door was noted to pop open or swing open.
>
> "The truck then continued to fall on its side and landed in the position shown in the photographs of the scene and in the police diagram.
>
> "That the righthand passenger heard the noise and saw the door go open. . . ." (T. 986)

Severy stated:

> "Well, the door popped open because of the combination of forces that developed in the 3 [front end contact on median (T. 991)] to 4 [right rear wheel contact with median (T. 992)] period of contact and would be open just . . . and the door would be open or swinging, in the process of swinging open, from 4 and slightly after 4, and then, as it rolled onto its side, the door would make contact in the course of reaching 5 [vehicle at rest (T. 992)]." (T. 994)

The appellants' analysis of this testimony is that in the period between "the truck . . . moving counter-clockwise, the rear wheels hitting the curb and the right rear tire beginning to deflate" the door opened (Appellants' Brief at 28). It would be equally justifiable to analyze this testimony as stating an opinion that the door opened when the right rear wheel impacted the curb—a position not founded in Lane or Leighton's testimony.

Severy's opinion essentially followed that of Ehrlich, namely, that the latch was so poorly designed that nominal forces imposed on it during the accident caused it to open (T. 1118, 1137). Unlike Ehrlich, Severy could identify the three positions of the latch at the time of his testimony. Severy recognized that under certain conditions no latching system would keep a door closed (T. 1119). However, he opined that "the relatively nominal impact forces, the type that are associated with this particular accident" would not cause a totally encapsulated latch to fail (T. 982). Severy apparently ignored the damage to the superstructure and the tire rim as a result of the accident in reaching this conclusion (T. 988, 1129). Without producing photographs or other demonstrative evidence to substantiate his position, Severy testified that a 1962 Ford pick-up truck (T. 972, 1062) and a 1963 Dodge truck (T. 972, 1062) had totally encapsulated latches. He also testified, in apparent contradiction to the above, that the mock-up of the "safety latch" that Ehrlich had prepared was not in use until "about 1964" (T. 974-75). Severy also pointed out what he felt to be the objective evidence of the alleged defect in the latching system in the nature of certain marks that were on the striker plate. In sum, he stated that the door itself vibrated prior to opening and that this vibration was evidenced by marks on the striker plate (T. 980-81, 1067-69, Exhs. 75, 80G-1 and J-1).

Severy was asked to compute this nominal force in terms of kinetic energy as the truck traveled down the roadway. After acknowledging that the vehicle increased its speed as it spun around, and that the rotational force was increased by the whip action of the trailer (T. 1122-26), Severy computed this nominal force to be 580,000 foot pounds (T. 1197). This force he acknowledged had to be dissipated between the point of the vehicle's loss of control and the point where the vehicle came to rest (T. 1127). It was conceded that the icy road surface created less friction than a dry road surface and consequently less kinetic

energy is dissipated thereon; nevertheless, Severy still insisted that the forces on the latch were nominal (T. 1138). Although Severy maintained that these forces were nominal, he unabashedly stated that these forces, which he admitted were dissipated, at least in part, by the rear wheel impact (T. 1133), caused the permanent twisting to the chassis rails and the damage to the superstructure (T. 998) —a statement not based upon any claimed expertise by Severy but as he testified: "It is based upon common sense" (T. 1000).

Severy's direct testimony was challenged from an engineering and credibility standpoint and the weight of the evidence supports a finding of fact that the forces on the latch were not nominal. Both Severy and Ehrlich knew that the vehicle was used in on and off-the-road use. In off-the-road use, the vehicle went over curbs, ruts and various types of terrain that could be encountered in a rural setting. Yet, the latch never failed during the entire history of its use by Jersey Central. The inference is that nominal forces did not and, indeed, could not cause the latch to fail.

Severy's credibility was also at issue. Although he described the three positions of the latching system, not one of his 49 photographs of the latch in various positions depicted it in the primary position (T. 1018-19).* If he knew there was a primary position in addition to the secondary and open positions, one would assume that at least one of the many photographs he personally took would have shown it. The clear implication is that Severy did not know the workings of the very latch he was criticizing.

The objective evidence of the defect in the latch, according to Severy, was the presence of scrapings on the striker plate. Later testimony and blow-ups of photographs of the latch taken by Ehrlich shortly after the

* It is well to note that although Severy did not make the same error made by Ehrlich in connection with the different latch positions, he did not take the stand until Ehrlich had been cross-examined as outlined above and, indeed, conceded that he discussed Ehrlich's testimony with plaintiffs' counsel (T. 1019-20).

accident demonstrated that the scrapings were not on the striker plate when the photographs were taken, but, unexplainably appeared on the striker plate prior to trial (T. 1661-64, Exhs. A-117 through 121). The supposedly objective evidence of defect were merely paint scrapings (T. 1663).

Severy also conceded that the totally encapsulated latch introduced by Ehrlich was developed for passenger vehicles without a continuous "B" post, that is, vehicles commonly known as hardtop convertibles. In fact, he had testified on behalf of Volkswagen in another case where the accident vehicle did have a "B" post and was not equipped with the totally encapsulated latch, that the latch mechanism on the Volkswagen was adequate and a totally encapsulated latch was unnecessary. There was no question that in the instant case the subject vehicle also had a "B" post and this was pointed out to the jury (T. 1140-45). In summary, the direct testimony of Severy was sharply challenged and its weight was a pure jury issue.

To rebut the above testimony General Motors essentially relied upon the testimony of two experts: D. D. Forester and Dr. Morfopolous.

Testimony of D. D. Forester: Forester is the Assistant Chief Engineer for General Motors' Truck & Coach Division whose primary duties concern the design of trucks manufactured by that Division of General Motors. One of his responsibilities in the past was that he was in charge of the testing of prototype truck models at General Motors' test track facility in Michigan. He testified that the latch design was a sound one and that nominal forces would not cause it to fail. Forester, who was throughly familiar with the latch and its testing, traced the development of the latch and testified that before the GMC TM 7500 series was put into production, each model including the TM7750 series, the model in question, was test driven for 25,000 miles (T. 1446, 1450). The vehicle was tested on various

types of surfaces, over a Belgian block course which included a diagonal ditch designed to induce a twist into the chassis (T. 1448, 1449). Both of the aforementioned tests cause substantial forces to be introduced into the chassis; the diagonal ditch test actually involves a twisting of the vehicle. There were no reports of deficiencies in the latching system as a result of these tests (T. 1452). Mr. Forester described the workings of the latch as an integrated system and related the service history of the latch.

The latch mechanism has six metal parts. There is the latch itself which mates with a striker plate on the B-Post and two pairs of strikers, one upper and one lower, that mate to provide an additional vertical restraint (T. 1465-75, Exh. A-104). Severy had testified that the upper and lower striker devices were merely for anti-rattle purposes (T. 1060). Forester testified clearly that this was not the case and that anti-rattle devices obviously would be made from rubber (T. 1473). Nearly a million of these latches had been used with no reported failures (T. 1481).

Forester's opinion was that nominal forces would not cause the latch to disengage. This opinion was based on the integrity of the latching system as a whole and on the three point mounting of the cab on the chassis which substantially isolated the cab from the tortional inputs that the frame was subjected to when the vehicle mounted an ordinary curb (T. 1483, Exh. A-84).* Forester testified that in his opinion the door was caused to open by either the inadvertent action of an unbelted occupant as he was thrown about the cab on impact with the curb or by the application of extreme forces to the cab and latch mechanism generated by the severe impact of the vehicle against the curb. The first conclusion was based upon his personal observations of the manner in which occupants move when a truck hits a hole, curb or other obstacle on the roadway.

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* Severy drew his conclusions regarding the latch without any consideration being given to this feature of the truck (T. 1052).

The latter conclusion was based upon the known force of the impact and documentary evidence which established that a damage inspection following the accident showed that the chassis had to be replaced (Exh. A-69).

Forester also explained why the cab door could open by reason of excessive force but that the man cab door, which was located to the rear of the cab door and was part of the body, did not open. He demonstrated by the use of a truck model that when a chassis is twisted the most severe distortion is at the frame rail ends where cab doors happen to be and that there is limited distortion at the frame rails in the area where the man cab was located (T. 1555-57, 1547).

Testimony of Dr. Vassilis Morfopoulos: Dr. Morfopoulos, an engineer with particular expertise in the testing of materials, also testified on General Motors' behalf. He was of the opinion that nominal forces would not have opened the door but rather that the dissipation of the kinetic energy when the right rear wheel of the vehicle struck the center median bent the chassis rails beyond their elastic limit; under these circumstances, no latch would have held the door closed (T. 1729). Dr. Morfopoulos was of the further opinion that the mounting of the curb by the front wheels would have no effect on the latching system. This opinion was based on the three point mounting of the cab, the concentration of frame rail twisting at the rear axle, and actual tests of a similar GMC TM7500 some ten serial numbers removed from the accident vehicle (T. 1643-60). The tests were conducted under static and dynamic conditions on a vehicle substantially similar to the accident vehicle and weighted in such a way to simulate the load conditions prevailing at the time of the accident. These tests revealed that the mere mounting of the curb would not have caused the door to open. Dr. Morfopoulos also demonstrated that the man cab was mounted on a quiet or nodal portion of the chassis

and not subject to the same twisting forces as the front cab (T. 1666, 1714). Dr. Morfopoulos concluded that the door was caused to open because of the tremendous forces exerted on the frame rails of the vehicle which taxed the latching system beyond its limits. This conclusion was based on the following: the tremendous amount of kinetic energy that was generated by the vehicle weighing approximately 28,000 pounds and traveling 25 m.p.h., the rotational force with which the vehicle struck the center median as increased by the unbraked trailer, the principal of physics known as Newton's law of inertia which established that the kinetic energy had to be and was dissipated by the violent striking of the median curb with the rear right wheel (T. 1642) and the fact that the chassis rails were bent out of shape. Dr. Morfopoulos quickly put to rest Severy's "common sense" contention that the chassis frame rail twisting occurred during the slamdown on the center median. He noted, as did Severy to a large extent, that the kinetic energy generated by the vehicle was dissipated when the rear wheel struck the center median. At this point, the factors that generate kinetic energy are miniscule in comparison: the downward acceleration of the vehicle, and the weight of that portion of the superstructure which is up in the air (T. 1718). Dr. Morfopolous' explanation that the 580,000 foot pounds of kinetic energy had been dissipated by the right rear wheel impact is supported by the testimony of Leighton (T. 399) and of William Greene, another member of the crew (T. 383)—the men testified that the vehicle's movement stopped or hesitated prior to the slamdown. The basis of Dr. Morfopolous' conclusion was bolstered by the testimony of Vincent Reilly, a Jersey Central employee who was in charge of removing the right rear tire from the truck after the accident. He testified that the impact was so great the rim had to be removed with a blow torch (T. 1906). Furthermore, Dr. Morfopolous testified that the latching mechanism on the subject vehicle was typical of cab door latches that he had

seen and that he had not seen the "safety" latch on a truck manufactured prior to the date of delivery of this vehicle (T. 1707-08).

It was clearly established that the vehicle had been used in off-the-road situations nearly 40 per cent of the time (T. 408) and was, consequently, subject to various types of terrain that would tend to twist the chassis. Yet, the door never opened. The latch had been used extensively without a report of latch failure (T. 1481). Actual testing established that chassis twisting caused by mounting a curb would not cause the door to open. The cab was mounted on the chassis on three points which helped to insulate the latch from nominal forces. The forces that were generated by the impact were so great that they twisted the chassis rails out of shape and necessitated the use of a blow torch to remove the rear rim. All of the above provided a reasonable basis for the jury to conclude that nominal forces would not cause the latch to open and that the tremendous forces exerted on the latching system during the course of this accident could not have been withstood by any other system.

Trial counsel for the plaintiffs chose not to rebut the testimony of Forester and Dr. Morfopolous. He chose instead to rest on the testimony of Ehrlich and Severy.

The evidence clearly supports the jury's verdict. The jury could have found that the door opened when the right rear wheel impacted the curb, that the chassis damage occurred at that point, that the man cab was on a quiet portion of the chassis and that, in any event, the type of latch on the man cab was a matter of speculation. In short, the jury could have found that no latch would have kept the right front door closed during this impact. As will be demonstrated below, the overwhelming weight of the evidence in favor of General Motors is, in no way, diminished by the instructions of the learned District Court—

the same Court which witnessed the trial of this action and in denying the plaintiffs' motion for a new trial stated:

> "The case presented, the specific claims, the experts on both sides, were in sharp disagreement.
>
> "There were issues of credibility presented both as to expert and lay witnesses and the jury exercised its function in making a disposition upon the entire record." (T.N.T. 23)

That "disposition" should not be disturbed here.

POINT I

Appellants, by Failing to Take Exceptions to the Charge, by Praising the Charge, and by Submitting a Theory of the Case and Requests to Charge that are in Accord with the Objected to Portions of the Charge, are Precluded from Objecting to the Charge.

The plaintiffs' position on this appeal is that the District Court misstated their theory of the case and consequently charged them "out of Court", incorrectly answered a question from the jury, incorrectly imposed upon them the burden of proving that the latch was "unreasonably dangerous", failed to explain the concept of "defect", and that these errors, coupled with the charge relating to Lane's failure to wear a seat belt,* constituted highly prejudicial error. In so claiming, the plaintiffs failed to advise this Court that: (1) trial counsel praised the charge prior to the case being submitted to the jury; (2) counsel of record praised the charge before the District Court in a motion for a new trial; and (3) the charge was substantially in accord with the trial counsel's characterization of the case and with the plaintiffs' requests to charge. Each one of the above facts independently precludes the plaintiffs from attacking the charge on this appeal. Any other conclusion

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* Since the jury never had to resolve the seat belt issue, the District Court's charge on this issue will not be discussed here. *See* Point II *infra.*

would condone a practice condemned by this Court. As stated in *United States* v. *5 Cases,* 179 F.2d 519, 523 (2d Cir.), *cert. denied,* 339 U.S. 963 (1950):

> "The victim of alleged prejudice cannot be allowed to nurse it along to the point of reversibility and then take advantage of a situation which by its own silence he has helped create."

The plaintiffs here were not merely silent—they specifically approved of the charge. In any event, as demonstrated in Point II *infra,* the charge was not erroneous.

A. The Plaintiffs Praise of the District Court's Charge.

Following the delivery of the charge, the District Court requested exceptions. The plaintiffs had none. Moreover, trial counsel for the plaintiffs had the following comments:

> "Mr. Walkup: Considered in its totality, if I may respond to that, it would seem to me that his Honor told the jury that he was merely making a broad outline [of the claims] to help put the matter in context and the jury would disregard his thoughts, and it would be up to them, *and counsel debated on it elaborately in argument.* . . . It was a very balanced charge and I don't think it is going to mislead the jury at all. . . ." (T. 2454) (Emphasis added.)

The plaintiffs did not limit their praise of the charge to the trial of this action. During the argument upon plaintiffs' motion for a new trial, plaintiffs' counsel of record also praised the charge:

> "The Court: I think you got a very favorable charge on products liability. The defendant excepted to the charge. I gave a broader charge than the defendant thought I should have. They wanted a charge that there had to be proof that it was unreasonably dangerous. That was the basis of their exception to the charge. I said that the proof simply had to show that it was not reasonably fit for its intended purpose.

"Mr. Hirschhorn: *We were perfectly satisfied with the charge.*

* * *

"Mr. Hirschhorn: You will notice that there wasn't a single word—and this is what the defendant General Motors said—that I am challenging the Court's charge. (T. N. T. 12)

* * *

"Mr. Hirschhorn: There is no question about the law and the way the charge went and we didn't except to the charge, and there was not any point to except to it. *It was a pre-eminently fair charge.*" (T. N. T. 15) (Emphasis added.)

This praise was not limited to the District Court's main charge but also applied to the supplemental instruction which was given in response to a question from the jury. The jury had asked if anyone had testified "why safety nonburst locks were not used on trucks in June (June 2, 1967)?" After consultation with counsel, the District Court advised the jury that neither it, nor counsel, had any recollection of such a question being asked (T. 2459-60).

During the argument on plaintiffs' motion for a new trial, plaintiffs' counsel of record conceded that the District Court was correct in its supplemental charge and that, in any event, the question had little significance:

"The Court: Mr. Hirschhorn, didn't I consult with counsel before I prepared my answer with respect to that?

"Mr. Hirschhorn: Oh, yes.

"The Court: And did I not ask each lawyer whether or not he had any recollection of any testimony in the case on that subject?

"Mr. Hirschhorn: *That's correct, exactly as you say.*

"The Court: And wasn't the answer that I prepared based in effect on a consentual basis, with all lawyers agreeing that to the best of their recollection there was nothing in the record?

"Mr. Hirschhorn: *Absolutely, Your Honor.*

"The Court: What is the complaint then?

"Mr. Hirschhorn: The point is standing by itself the prior question *had no particular significance* because we didn't know what the jury really then was inquiring into. There wasn't enough by one single question for any counsel to determine what it meant . . ." (T.N.T. 6) (Emphasis added.)

The District Court's response to the jury's question, which was not challenged in any manner below, has now become the "death knell to plaintiffs' claim that the latch was defective" (Appellants' Brief at 56) and "fatally infected" the jury's verdict (*Id.* at 7). The plaintiffs' change in position goes beyond the incredible.

B. The Plaintiffs' Prior Position On The Objected To Portions of the Charge:

The plaintiffs submitted a trial brief and two sets of requests to charge which set forth their position on matters before this Court. In addition, certain comments of trial counsel set forth the plaintiffs' position.

Theory of the Case: The plaintiffs' theory of the case was expressed as follows:

"During the roll-over process the right front door of the truck came open which caused his legs to be pinned by the truck when it completed its roll-over." (Plaintiffs' Trial Brief, at 1)

• • •

"It is submitted that the jury be instructed in accordance with the foregoing principles." (*Id.* at 16)

This theory was reiterated before the jury:

"[A]s a result of the turnover and popping open of the door next to him in the turnover he was injured. . . ." (T. 1)

"All right. Let's get into that damage which occurred in the roll-over accident." (T. 1715)

On this appeal, the plaintiffs urge this Court to reverse the judgment of the District Court because, in a portion of its charge, it stated: *"the latch failed to hold during the roll-over"*; "the failure of the latch to remain in its locked position *during the turnover of the vehicle . . .*" (Appellants' Brief at 39 (emphasis theirs)). It cannot be disputed that the District Court used the plaintiffs' own words in the charge and no exception was taken. The plaintiffs' claim that they were charged "out of court" is specious.

Unreasonably Dangerous: General Motors does not dispute that the plaintiffs maintained that they should not be imposed with the burden of proving that the latch was "unreasonably dangerous." It is equally clear that the District Court was in accord with their position. Thus, General Motors excepted to the charge on the ground that it did not impose such a burden of proof (T. 2450-51). In the context of General Motors' exception which certainly focused on this aspect of the charge, plaintiffs offered no comment and took no exception.* Moreover, the District Court advised the plaintiffs two days prior to its charge that it was going to charge that "it was not reasonably fit, in the event of an accident, to minimize *unreasonable risk of injury* to a plaintiff"** (T. 2277) (emphasis added). The underscored language is the same language objected to here. It was not objected to in the District Court even though trial counsel knew the exact language that the District Court proposed to use two days in advance of the charge. The plaintiffs cannot complain now.

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* The plaintiffs do not contend on this appeal that any reference to reasonableness is erroneous. Plaintiffs' trial counsel, indeed used the term in his summation when he stated that General Motors was required to provide a "reasonable design" (T. 2370-71).

** The word "minimize" was not used in the charge, rather the District Court used "avoid", a word more favorable to plaintiffs (T. 2417).

The Definition of Defect: The plaintiffs defined "defect" in their trial brief and first set of requests to charge as "a product" which is "not reasonably fit for the ordinary purpose for which such products are sold and used" (Plaintiffs' First Set of Requests to Charge #7;* Plaintiffs Trial Brief at 5). On this appeal, the plaintiffs contend that "intended" use is a breach of warranty term which only confuses a jury in a strict liability case. Aside from trial counsel's statement that a breach of warranty claim is "substantially equivalent" to a strict liability claim (T. 806), the District Court charged in accordance with the plaintiffs' own requests and no exception was taken to the charge.

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* The full text of this request reads as follows:

> "The manufacturer of a product is liable if the product was defective, that is, not reasonably fit for the ordinary purpose for which such products are sold and used, and the defect arose out of its design or manufacture or while the product was in the control of the manufacturer and it proximately caused injury or damage to the ultimate purchaser or a reasonably foreseeable consumer or user. Proof of the manufacturer's negligence in the making or handling of the article is not required.
>
> In order to hold the defendant liable in this case you must determine that: (1) the product manufactured by the defendant was not reasonably fit for the ordinary use for which it was intended; (2) the defect arose out of its design and manufacture while the product was in the control of the manufacturer; (3) the defect proximately caused injury or damage to the plaintiff; and (4) the plaintiff was the ultimate purchaser or a reasonably foreseeable consumer or user."

The parallel request in the second set of requests to charge contains no definition of defect and reads as follows:

> "The manufacturer of a product is liable if its product was defective and the defect arose out of its design or manufacture or while the product was in control of the manufacturer, and proximately caused injury or damage to the ultimate purchaser or reasonably foreseeable consumer or user. Proof of the manufacturer's negligence in the making or handling of the article is not required. In order to hold the defendants, or either of them, liable in this case you must determine that: (1) the defect of design or manufacturer existed while the product was in the control of the defendants, or either of them; and (2) the defect proximately caused injury or damage to the plaintiff."

C. The Plaintiffs' Failure to Except to the Charge Precludes Review.

Point II of the Appellants' Brief (at 18-58) is devoted to the alleged improprieties of the District Court's charge to the jury. Appellants now contend, for the first time, that the District Court's instructions both on the facts and on the law were erroneous. Rule 51 of the Federal Rules of Civil Procedure clearly precludes the plaintiffs from advancing that argument. The Rule provides, in part:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Plainly, the purpose of Rule 51 is to prevent appeals from being taken and to inhibit the occurrence of reversals and consequent new trials because of errors in a charge which the Trial Judge could have corrected had the error been brought to his attention. *Cohen* v. *Franchard Corp.*, 478 F.2d 115, 124 (2d Cir.), *cert. denied*, 414 U.S. 85 (1973); *United States* v. *Heyward-Robinson Co.*, 430 F.2d 1077, 1084 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *Steinhauser* v. *Hertz Corp.*, 421 F.2d 1169, 1173 (2d Cir. 1970). Appellants, by raising as error on this appeal matters to which they took no exception, have engaged in the precise conduct against which Rule 51 is directed. This Court held in *Heyward-Robinson, supra*, that "Appellants have failed to preserve their right to review * * * these * * * errors [under Rule 51] and are therefore precluded from raising them on appeal." *Id.* at 1083.

It is therefore clear that plaintiffs seek to reverse the jury's verdict based on grounds created by their own silence and, to say the least, acquiescence. *Rayward* v. *Silberman*, 356 F.2d 611, 613 (2d Cir. 1966); *National Screen Service Corp.* v. *United States Fidelity & Guaranty Co.*, 364 F.2d 275, 280 (2d Cir.), *cert. denied*, 385 U.S. 958 (1966); *Stevenson* v. *United States*, 378 F.2d 354, 355 (2d Cir. 1967).

Plaintiffs have not provided this Court with any explanation for their noncompliance with Rule 51. Had plaintiffs raised these matters with the Trial Judge, as Rule 51 requires, the District Court could have reconsidered its charge, and, assuming it found it to be either erroneous or confusing, could have amended the charge.

D. The Doctrine of Fundamental Error Should Not Be Applied.

The plaintiffs argue that the charge was "fundamentally erroneous" and the judgment below should be reversed. In *Franchard, supra,* this Court set forth the standards applicable to a claim of fundamental error:

> "After careful review of the entire record . . . we are convinced that these alleged errors do not warrant our invoking the plain error rule. In our view, plaintiffs' claims do not demonstrate that a substantial miscarriage of justice has occurred. Granted that the alleged errors relate to important elements in the appellants' case, we do not believe that the plain error rule demands that every error, even on a significant aspect of the case, requires reversal despite failure to comply with Rule 51.... Intervention by us to correct such questionable errors under the plain error doctrine would undercut the salutary rule that claims must be raised in and ruled upon by the trial court before they are ripe for appellate review. As Professors Wright and Miller have stated, '[i]f there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" 478 F.2d at 124-25. *E.g. Modave* v. *Long Island Jewish Medical Center,* 501 F.2d 1065, 1072 (2d Cir. 1974).

Applying the above principles to this case, it is respectfully submitted that the fundamental error doctrine is not applicable to this case.

The appellants have not demonstrated any "miscarriage" of justice, much less a substantial one. The jury simply did not believe their witnesses. Moreover, the Trial Judge who denied the plaintiffs' motion for a new trial necessarily had to determine that there was no miscarriage of justice. *Creagh* v. *United Fruit Co.*, 178 F. Supp. 301, 307 (S.D.N.Y. 1959). That determination may only be set aside for a "clear abuse of discretion." *E.g., Diapulse Corp. of America* v. *Birtcher Corp.*, 362 F.2d 736, 744 (2d Cir. 1966), *cert. dismissed*, 385 U.S. 801 (1967). As the Statement of the Case, *supra*, at 2-22, clearly sets forth, there were many disputed facts requiring jury resolution. There could have been no clear abuse of discretion on the District Court's denial of the motion for a new trial; consequently, there can be no miscarriage of justice justifying application of the plain error rule.

The plaintiffs' own conduct, moreover, should preclude the application of the plain error rule. As noted in *Remington Rand, Inc.* v. *United States*, 202 F.2d 276, 278 (2d Cir. 1953): "A party may not secure a reversal resulting in prolonging the litigation upon an error for which he is responsible." *Accord, Director General* v. *S.S. Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973). The plaintiffs having invited the supposed errors in the charge cannot complain here. As noted in *Gardner* v. *Darling Stores Corp.*, 138 F. Supp. 160 (S.D.N.Y. 1956), *aff'd*, 242 F.2d 3 (2d Cir. 1957), such an attempt is an assault upon the integrity of the Court:

> "The practice of law is not a trade, however, nor is it a game. It is a profession, and the attorney is an officer of the Court, and, as such, is required in his conduct before the Court and in his statements to the Court to act with 'candor and fairness'. . . . Putting on the conduct of counsel the construction most favorable to him, we can only conclude that he either intentionally or without due care sought to mislead the Court, and now seeks to capitalize on this intentional or careless deception.

> "Such conduct is neither allowed nor permitted. Where an attorney has requested a charge from the Court, and such charge has been given without exception by him, he cannot thereafter object to it and ask to have the verdict set aside or amended." *Id.* at 161-62. *See* C. Wright & A. Miller, *Federal Practice and Procedure* § 2558, at 675.

For all of the foregoing reasons, to the extent that plaintiffs attempt to overturn the jury's verdict based upon claimed errors in the charge to which no exception was taken, this Court should reject their appeal on the ground that plaintiffs' failure to except to the charge pursuant to Rule 51 precludes them from raising the alleged errors.

POINT II

Assuming *Arguendo* that Plaintiffs are not Precluded from Asserting Errors in the Charge, the Charge was Nevertheless Correct in its Statement of the Law and in other Respects.

The plaintiffs' attack on the District Court's charge, quite unsurprisingly, focuses on various words or phrases that are supposedly erroneous. There is no discussion of the totality of the charge or the summations which preceded it. The plaintiffs' approach to this issue is wrong—the charge must be viewed as a whole and in the context of counsels' summations. As this Court recently stated in *Begley* v. *Ford Motor Co.*, 476 F.2d 1276 (2d Cir. 1973):

> "The charge taken as a whole properly instructed the jury that plaintiffs' claim was that the *braking system*, of which the *brake fluid* was an integral part was defective. Although at times the court referred generally to defective brakes and defective brake mechanism, it was made clear that the only basis in the evidence for plaintiffs' claim of negligence and breach of warranty was the defective brake fluid. Furthermore, since the main charge came immediately after the summations of counsel, the jury surely

> knew, even before the court's charge, that plaintiffs' claim related only to the defective brake fluid. It was well within the trial judge's discretion in charging the jury not to superimpose a further summary of the essential claims of the parties." 476 F.2d at 1280. See *Norfleet* v. *Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir. 1966); *Franks* v. *United States Lines Co.*, 324 F.2d 126, 127 (2d Cir. 1963); *Oliveras* v. *United States Lines Co.*, 318 F.2d 890, 892 (2d Cir. 1963).

The plaintiffs' piecemeal approach is incorrect. As shown below, the charge as a whole was not erroneous or misleading.

A. Theory of the Case.

The plaintiffs submit to this Court that their essential theory was that the plaintiffs "had to convince the jury that the door opened when the rear wheels hit the median and that the major damage to the chassis rails and the superstructure occurred thereafter, when the truck rolled over" (Appellants' Brief at 39). The District Court used the word "rollover" and the plaintiffs claim that the use of that word charged them out of court.

Aside from the plaintiffs' use of the word "rollover" in presenting the case to the District Court and the jury, the District Court instructed the jury in accordance with the views of the plaintiffs advocated on the appeal. The District Court stated:

> "As to the claim against General Motors with respect to the latch system, plaintiffs' principal reliance is upon the testimony of Severy and that of another expert, I. Robert Ehrlich. The substance of their testimony is that the door popped open during the accident because the latch had a basic defect in design. Basically, their views were that the nominal force, together with the twisting which resulted when the right rear tire struck the median, caused the latch mechanism to separate and to open the door; that it failed because it was not encapsu-

lated or did not have the so-called anti-burst features, that had the system had such restraints, the latch would have held in the turnover.

Each defendant challenges plaintiffs' claims. Thus, as to the claim of the latch or the latch system, General Motors offered the testimony of Dewane Forester, Assistant Chief Engineer of General Motors Truck and Coach Corporation. He challenged plaintiffs' experts to the effect that the latch system was so designed that nominal forces such as came into play during the course of the truck's mounting the median curb caused the system to unlatch. Mr. Forester's view was to the contrary. He had two theories as to the door unlatching; one, that there was a severe deceleration of the vehicle causing Lane and other occupants of the cab to be jostled about, and in the process, Lane struck the door handle inadvertently; or, two, that the vehicle was subjected to extremely high kinetic energy much beyond that which the vehicle was designed to withstand, and that the extreme overload forced the door open.

Vassilis Morfopoulos, another expert witness, supported Mr. Forester's position, that powerful kinetic forces came into play in consequence of which the latch was stretched beyond capacity and came apart. He also agreed with Forester's view that this would have occurred no matter what type of latch was on the truck." (T. 2424-25)

The District Court made it clear to the jury that it was "[a]gainst this broad background, that they were to resolve these issues" (T. 2427). In summarizing the claims against General Motors based on the latch, the District Court did use the words "turnover" and "rollover". In themselves and in the context of the entire charge, these words did not charge plaintiffs out of court. The fairness of the District Court's instructions is highlighted by the summations of counsel.

Counsel for General Mortors stated the plaintiffs' theory of the case as, in essence, a claim that a nominal impact caused the door to open. He stated: "[I]f . . . you conclude fairly on this evidence that that latch opened with some kind of a nominal impact, my client is responsible here" (T. 2340). What clearer focus could plaintiffs want? He then outlined the items which he felt evidenced that the impact was not nominal: the weight of the truck (T. 2342); the gouging of the concrete on the median; the 580,000 foot pounds of kinetic energy (T. 2344); the forced removal of the rear tire (T. 2345); and the damage to the chassis (T. 2346). Counsel for General Motors then stated:

> "Now, why do they say nominal forces? Why should that be the position of an expert in the case? I mean he's got all this damage. Why does he say nominal force? . . . Because if he said . . . this wasn't a nominal force, this was a gigantic force, a super force, if he said that, he would be admitting the very reason why this door opened and why it is not the responsibility of my client." (T. 2347-48)

What clearer focus could plaintiffs want?

Plaintiffs' trial counsel likewise presented the theory of the case.

> "But I want to confine myself, first, to this nominal force, and I say the force we are talking about that's from the latch opening was, although a big force in the back, a nominal force as far as that door latch is concerned, because if it wasn't nominal, why wouldn't it have torn and bent some of this material like it did in the back of the truck?" (T. 2369)

He later stated that "in that wreck . . . the encapsulated kind [of latch] has the strength to withstand the forces which were exerted on it . . ." (T. 2389).

The plaintiffs have ignored all of the above on this appeal for good reason—the charge of the District Court clearly set forth their theory of the case as did the summations of counsel. Indeed, the charge was more munificent than it

needed to be. Two of the plaintiffs' lay witnesses had testified that the door opened prior to the rear-wheel impact. Dr. Morfopolous' tests clearly refuted this testimony, as did the truck's history of off-the-road usage without incident. The plaintiffs' experts espoused the theory that the door opened up on rear wheel impact and presented the case to the jury on that theory. The District Court could have pointed out this contradiction in its charge. Any confusion on this issue was thus caused by the plaintiffs' own witnesses, not the learned court below. The jury simply found that the door opened upon right wheel impact and that the damage to the chassis occurred at this time; in doing so, they chose to ignore Mr. Severy's "common sense" explanation of the chassis damage. The resolution of these issues was within the jury's province and should not be disturbed here.

B. The Jury's Question.

The plaintiffs' claim that the District Court failed to "respond appropriately" to the jury's question:

> "Did anyone testify why safety nonburst locks were not used on trucks in June (June 2, 1967)? (T. 2459)

The plaintiffs' suggested response on this appeal is:

> "Severy testified that safety nonburst locks were being used on trucks in June 1967 and had in fact been in use since 1962". (Appellants' Brief at 56)

This suggestion, aside from being inaccurate and incomplete,* fails to be responsive to the question—"Why?" The proposed response merely states that such latches were being used. The correct response is the response given by the District Court, after consultation with all counsel:

> "I have discussed the matter with the lawyers. My own recollection is that there is no such testimony,

* Severy never testified that these latches were in use in 1967, he merely stated he saw a safety latch on a 1962 and a 1963 truck (T. 972, 1062). Moreover, the suggested response fails to reflect either Ehrlich or Dr. Morfopolous' testimony.

> and the lawyers also agree that no one has any recollection that the specific question was asked of any witness. And that is the state of the record." (T. 2460).

There is nothing in the record which even suggests that any witness was asked: "Why weren't safety latches used?" Rather than wax eloquently about the differences between "why" and "whether or not" it is sufficient to respectfully direct this Court's attention to the record.

During his summation, trial counsel for the plaintiffs argued that "Ford" and "Chrysler" had the "safety latch" in their trucks prior to the manufacture of this vehicle (T. 2370).* During the District Court's instructions, it, to a degree, reiterated trial counsel's argument:

> "[An] available latch was the so-called encapsulated or anti-burst latch. . . ." (T. 2431)

It is obvious that the jury was made aware of plaintiffs' position that "safety latches" were used on trucks prior to June 2, 1967. The inescapable conclusion from the District Court's instructions and counsel's summation is that the jury wanted to know if anyone testified "why" such a latch was not used on the accident vehicle and there was no such testimony.

C. Unreasonably Dangerous.

The plaintiffs complain that the District Court imposed upon them the burden of proving that the latch had to be unreasonably dangerous. As stated in Point I, the District Court clearly thought that it had not charged in that manner. The reactions of counsel support that view and the entire charge demonstrates that the burden of "unreasonably dangerous" was not imposed on the plaintiffs.

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* It was at this point in his summation that counsel asked the following rhetorical question: "Well, why should the manufacturer have to put in a safe type of door latch just because [I] say there's a better and a safer type?" (T. 2370)

The District Court stated:

> "Generally stated, when a manufacturer puts into the public market a product which he manufactures, designs or assembles, and which is defective, that is, one not reasonably fit for its intended purpose or use, and such defect is a proximate cause of damage or injury, the manufacturer is held liable for the resulting damage." (T. 2415)

This language was reiterated in other parts of the charge, *e.g.*, "not reasonably safe for its ordinary or intended use or purpose" (T. 2428); "reasonably safe for its intended use or purpose" (T. 2429); "reasonably safe and available latch" (T. 2431); "reasonably adequate to avoid increased risk of injury" (T. 2432); "reasonably fit to avoid increased risk of injury" (T. 2432). Indeed, plaintiffs' trial counsel used similar words—a "reasonable design" (T. 2371). Moreover, "unreasonably dangerous" is the standard imposed by the New Jersey law of strict liability in tort.

The plaintiffs cite *Glass* v. *Ford Motor Co.*, 123 N.J. Super. 559, 304 A. 2d 562 (Law Div. 1973) (***nisi prius***), as the only reported case considering the question of "unreasonably dangerous" as part of New Jersey's strict liability in tort law. That is simply not the case.

In *Brody* v. *Overlook Hospital*, 127 N.J. Super. 331, 317 A. 2d 392 (App. Div. 1974), the Court specifically stated:

> "As a prerequisite to the application of the doctrine of strict liability a plaintiff must show that the product he alleges was defective was *unreasonably dangerous* for its intended use." 317 A.2d at 397.*

The *Brody* court is not standing alone as some of the cases cited in Appellants' Brief demonstrate. For example, in *Schipper* v. *Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314

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* General Motors respectfully calls this Court's attention to *Collins* v. *Uniroyal, Inc.*, 64 N.J. 260, 315 A. 2d 16, 20 n.4 (1974), where a dissenting opinion expresses the view that the New Jersey Supreme Court has not focused on this issue.

(1965), a case involving an alleged defective design as here, the Court stated:

> "In determining whether the house was defective, the test admittedly would be reasonableness rather than perfection. As we pointed out . . . the comparable warranty of merchantability in the sale of goods [ie: ns only that the article is *reasonably fit for the purpose for which it is sold,* and does not imply 'absolute perfection.' . . . And . . . *though the imposition of warranty or strict liability principles to a case of defective design, as alleged . . . here, would render unnecessary any allegation of negligence as such, it would not remove the plaintiffs' burden of establishing that the design, was 'unreasonably dangerous' and proximately caused the injury.*" 207 A.2d at 326 (emphasis added).

"Unreasonably dangerous" clearly is the law of New Jersey.

It is respectfully submitted that the charge considered as a whole did not impose upon the plaintiffs the burden of proving that the latch was unreasonably dangerous which, in any event, is the law of New Jersey.

D. The Definition of Defect.

The plaintiffs object to the District Court's definition of defect. As shown in Point I, the definition conformed with the plaintiffs' own requests to charge. Now they claim that "the charge as to defect contained no explanation of this 'highly technical concept' and left 'the applicable rule of law in a state of uncertainty.'" (Appellants' Brief at 41) There was no lack of definition here. Rather than point to a New Jersey case which would show that the District Court's definition is incorrect, the plaintiffs speak of the word "defect" conjuring up images of negligence and accuse the District Court of not adhering to the concepts of products liability law advanced by various jurisdictions

other than New Jersey (Appellants' Brief at 41-45). Their argument is woven of whole cloth.

The District Court did define defect (T. 2415, 2428, 2429) and defined it in the context of the plaintiffs' claims:

> "Here plaintiff argues that a reasonably safe and available latch was the so-called encapsulated or anti-burst latch, and had one been installed, then under the conditions of this accident the door would not have opened, which, as you know, is disputed by the defendant." (T. 2431).

The District Court's definition is in accord with New Jersey law and the plaintiffs' claim that the language used is only permissible in a breach of warranty action is wrong as the elements of a cause of action for breach of warranty and strict liability in tort are the same. *Raritan Trucking Corp.* v. *Aero Commander, Inc.*, 458 F.2d 1106, 1113 (3d Cir. 1972); *La Rossa* v. *Scientific Design Co.*, 402 F.2d 937, 940-41 (3d Cir. 1968); *Cintrone* v. *Hertz Truck Leasing & Rental Service*, 45 N. J. 434, 212 A. 2d 769, 778-79 (1965); *Schipper* v. *Levitt & Sons, Inc., supra*, 207 A. 2d at 326.

E. The Seat Belt Instructions.

The jury was instructed that *if* they found liability they were to determine if Lane was negligent in not wearing a seat belt, and, if so, to determine the amount of injuries that were occasioned by that failure (T. 2445). The District Court specifically instructed the jury that this issue was not to be considered until liability was determined. The Court stated:

> "You reach the question of damages only if you find the plaintiff has sustained his burden of proof upon his claims as to one or both defendants." (T. 2436)

Liability not having been found, it must be presumed that the jury followed the District Court's instructions and did not consider the seat belt issue at all. *Mays* v. *Dealers Transit, Inc.*, 441 F.2d 1344, 1347 (7th Cir. 1971); *Pittman* v. *Littlefield*, 438 F.2d 659, 662 (1st Cir. 1971); *Lifetime Siding, Inc.* v. *United States*, 359 F.2d 657, 661 (2d Cir.), *cert. denied*, 385 U.S. 921 (1966). Thus, the instructions on the seat belt are irrelevant to this appeal.*

* It is evident that the plaintiffs, likewise, are of the view that this point is irrelevant because, despite their claim that a seat belt instruction is clearly wrong under New Jersey law, their brief does not include even one citation on the point. General Motors' position is that such a charge is warranted. *Devaney* v. *Sarno*, 125 N.J. Super. 414, 311 A. 2d 208 (App. Div. 1973). *See Dziedzic* v. *St. John's Cleaners & Shirt Launderers, Inc.*, 53 N.J. 157, 249 A. 2d 382 (1969).

POINT III

The District Court did not Err In not Instructing the Jury that the Latching System was *per se* Defective and, in any Event, the Plaintiffs' Failure to Raise this Point Below Constitutes a Waiver of Presenting the Argument Here.*

The only logical analysis that can be drawn from Point I of the appellants' brief is that the law of New Jersey imposes liability upon General Motors because it "fail[ed] to install safety latches available in the industry" (Appellants' Brief at 8). This position is assailable on two grounds: one, the plaintiffs failed to raise this argument, which involves disputed questions of fact, before the District Court; and, two, the law of New Jersey imposes no such liability.

A. The Plaintiffs Failed to Raise this Disputed Point Before the District Court.

The plaintiffs assert, as an undisputed fact, that "safety latches" were available in the trucking industry; moreover, they imply that the Society of Automotive Engineers ("S.A.E.") recommended that "safety latches" be used on trucks (Appellants' Brief at 55, 26). Both of these issues were in dispute. The only use of a "safety latch" that was not in dispute was, as Forester testified, that such latches were used in General Motors' passenger cars prior to the manufacture of this truck (T. 1512).

The testimony on the use of the "safety latch" on trucks prior to the manufacture of this truck was disputed. Severy testified that he saw them on two trucks, one a pick-up truck and the other a lighter truck than the accident vehicle (T. 1062). Ehrlich had no knowledge of the use of a "safety latch" on a heavy truck; he had only seen the latches on light pick-up trucks that double as passenger cars (T. 687-88). On the other hand, Dr. Morfopolous had never seen a

* General Motors does not dispute that the law of New Jersey is applicable to the substantive issues of liability.

"safety latch" on a truck manufactured prior to the accident vehicle (T. 1707-08). Thus, the evidence on the use of the "safety latch" in trucks was in dispute.

The plaintiffs' attempt to equate the use of "safety latches" on cars to trucks was also in dispute. First of all, there were no S.A.E. recommendations that "safety latches" be used on trucks (T. 1138-39). Moreover, Severy had testified in another case that a car with a B post, such as that on the truck, did not need a "safety latch" (T. 1140-45). Thus, the testimony of the plaintiffs' own expert witness was inconsistent as to whether or not the use of a "safety latch" on a car could be equated to its use on a truck.

The "availability of safety latches" presented issues of fact to be resolved by the jury and not the District Court. In any event, the plaintiffs never even suggested to the District Court that it should instruct the jury that the vehicle's failure to have the plaintiffs' "safety latch" *per se* was evidence of a defect or imposed liability upon General Motors.

As this Court noted in *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 461 (2d Cir.), *cert. denied*, 382 U.S. 811 (1965): "[W]e decline to consider a claim not presented to the trial court which raises substantial issues of fact, requiring resolution. . . ." Although *List* involved an attempt to argue on appeal entirely new allegations, the above rule is equally applicable to situations of lesser dimension. In *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972), a products liability case, the appellant argued that the exclusion of certain evidence mandated a new trial. This Court noted that the appellant failed to make an offer of proof and stated:

> "An appellate court will not reverse on the mere possibility that the exclusion was harmful . . . nor will it permit a party to allege on appeal what it failed to claim in the trial court. *To do so would allow a party to obtain a new trial simply on its claim that it would have proven a certain fact or facts had it been given a chance.*" *Id.* at 967 (emphasis added).

The identical principles are applicable here.

B. The Law of New Jersey Does Not Establish That the Latch Was *Per Se* Defective.

The plaintiffs' reliance upon *Bexiga* v. *Havir Manufacturing Corp.*, 60 N.J. 402, 290 A.2d 281 (1972), and *Finnegan* v. *Havir Manufacturing Corp.*, 60 N.J. 413, 290 A.2d 286 (1972), is misplaced: both cases involved injuries which were caused by a machine that had *no* safety devices and, moreover, neither case abrogated the jury's task of deciding the issue of a defect.

In *Bexiga,* the plaintiff's hand was cut on a punch press which had no safety device that protected the machine's operator. The manufacturer defended the case on the theory that the purchaser was expected to install safety devices due to the custom of the trade. 290 A.2d at 284. The trial court dismissed the case and the New Jersey Supreme Court reversed and remanded the case for a new trial. The Court stated:

> "We hold that where there is *an unreasonable risk of harm* to the user of a machine which has *no* protective device, as here, the jury *may* infer that the machine was defective in design. . . ." 290 A.2d at 285. (Emphasis added.)

The accident vehicle here, of course, did have a protective feature which was different from the device that plaintiffs claimed would have prevented the door from opening. Severy, in fact, did not testify that the vehicle's latch was not a "safety latch"—he merely testified that "as installed, it is not". (T. 960). Severy testified:

> "[A]s we vary in size, the quality of the latch has to be commensurate with the structure in which it is being installed; and the other factor has to do with the inner acting agencies of that particular latch, the striker, and whether it embodies such things as limitations for longitudinal movement, either through the constraint of the door jamb or through wedge blocks, other vertically limiting devices; that actually limits movement vertically, and other devices that

limits its movement horizontally or longitudinally." (T. 960-61)

The latch system in question did have wedge blocks in the form of upper and lower strikers (T. 1473) and the cab in which the latching system was installed was mounted in a manner which substantially isolated the cab from the tortional imputs that the frame was subjected to when the vehicle mounted the curb (T. 1483). General Motors submits that the latching system on the vehicle was, to paraphrase Severy, a safety latch "as installed." Any argument to the contrary would be specious.

The facts in *Finnegan* are substantially the same as those in *Bexiga*. Procedurally, the cases are quite distinct. In *Finnegan,* the trial court granted the manufacturer's motion for a judgment n.o.v.; the Supreme Court reversed and reinstated the jury's verdict. The Court stated:

> "To be held liable under strict liability principles the Restatement, §402A, not only requires that the machine be in an *unreasonbly dangerous condition* but also that the manufacturer expect it to reach the user without substantial change.
>
> • • •
>
> Although defendant's expert testified that the . . . [alteration] increased the likelihood of accidentally activating the press and that that change was the cause of the accident, he conceded that had the machine been equipped with an effective point of operation safety device the accident would not have occurred. The jury *could infer* that because of the lack of a safety device the accident would have occurred notwithstanding . . . [the alteration]." 290 A.2d at 292. (Emphasis added.)

The jury here was faced with the same type of decision as the jury in *Finnegan,* namely, would the injuries have occurred regardless of the presence of a "safety latch." General Motors' position was that the injuries would have

occurred regardless of the type of latching system used. This position was supported by the principles of kinetic energy and inertia and demonstrated by the permanent deformation of the chassis, the damage to the rim, and the gouging of the concrete median.

These complicated issues were resolved by a jury, the same jury which witnessed Ehrlich concede that he did not know how the latch on the truck worked; the same jury which witnessed Severy testify as to scrapings on the stricker plate of the vehicle's latch which evidenced the "defect"—scrapings which were not on the stricker plate after the accident. As this Court noted in *Modave, supra,* 501 F.2d at 1074:

> "[I]f the jurors found themselves capable of this feat, it is not for us to say them nay."

The cases cited by the appellants, many of which merely set forth a sketchy history of the development of the products liability law of New Jersey, do not detract from the above. Some of the cases do, however, necessitate some comment.

In *Cintrone* v. *Hertz Truck Leasing & Rental Service, supra,* the Supreme Court reversed the trial court's dismissal of the plaintiffs' breach of warranty cause of action and ordered a new trial. There was no finding, as implied in Appellants' Brief at 11 footnote, that the mere happening of an accident proved a defect. The Supreme Court left the resolution of all issues of defect, contributory negligence and credibility to the jury. 212 A.2d at 779. The District Court here also properly recognized the jury's function.

In *Bair* v. *American Motors Corp.,* 473 F.2d 740 (3d Cir. 1973), a negligence case, the jury rendered a verdict in favor of the defendants. The plaintiff offered only one liability witness and the defendant none. The Court of Appeals reversed and remanded for a new trial holding

that certain evidence was improperly excluded. There is no evidentiary issue here and, unlike the defendant in *Bair*, General Motors offered a substantial case on liability which established that no door latch would have prevented the door from opening under the circumstances of this accident.

In *McKinney* v. *Frodsham*, 356 P. 2d 100 (Wash. Sup. Ct. 1960), there is no mention of a safety latch. In *McKinney*, the plaintiffs' expert testified that the latch on a Volkswagen two-door sedan opened with the mere application of ten to twenty pounds of force. 356 P. 2d at 105. The jury in *McKinney* agreed and returned a verdict in favor of the plaintiffs. In this case, testimony showed that the force was approximately 580,000 foot pounds of kinetic energy (T. 1197). The jury agreed and returned a verdict adverse to the plaintiffs.*

In *Walker* v. *International Harvester Co.*, 294 F. Supp 1095 (W.D. Okla. 1969), the plaintiff was ejected from a vehicle and contended that had a safety latch been used, the door would not have opened. The defendant contended, *inter alia*, that, due to the severity of impact, no door latch would have kept the door closed. 294 F. Supp. at 1097. The *Walker* case is in one significant respect similar to the instant case. Here also the defendant manufacturer contended that no door latch would have withstood the impact. The jury's resolution of that issue should not be disturbed.

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* It is interesting to note that the vehicle which Mr. Severy stated did not need a "safety latch" was also a Volkswagen (T. 1140-45).

Conclusion

For all of the reasons hereinabove set forth, defendant-appellee, General Motors Corporation, respectfully prays that an order be made and entered herein affirming in all respects the Order and Judgment of March 19, 1974, and awarding it the costs of this appeal.

Dated: New York, New York
November 18, 1974

Respectfully submitted,

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